permissible under the combined effect of section 72 of the Penal Code and section 270 of the Criminal Procedure Code. I think, however, that the alternative conviction should be used only where the doubt is between two offences of similar gravity. There may be cases, particularly where the possession of fairly recently stolen property is the only evidence against an accused person, where it is quite certain that the accused is either a housebreaker or a receiver but quite impossible to tell which, but in such a case I do not think a conviction in the alternative would be justified because the accused should be given the benefit of this doubt and convicted of the lesser offence. In the present case I think the evidence that the accused were the thieves was very strong. In this connection I think it is useful to quote from the judgment of the Lord Chief Justice in the case of *Rex v. James Loughlin*[1]:—

"Now, it is too often the case, where a man is charged with housebreaking and the evidence against him is that soon after the breaking and entering he is in possession of the property, that the Court directs the jury that there is no evidence that he broke and entered and tells the jury to concentrate on the receiving. That is not the law. If it is proved that premises have been broken into, and that certain property has been stolen from those premises, and that very shortly afterwards a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebraker or shopbreaker and, if he is, it is inconsistent to find him guilty of receiving, because a man cannot receive from himself."

The last portion of this passage is not quite applicable to the present case because the alternative charge was not for receiving stolen property but for retaining it, and of course the thief himself can retain stolen property. However, the possession of the property was very recent indeed. The Police caught the two accused practically red-handed almost immediately after the theft and in the vicinity of the premises which had been broken into. In my opinion, therefore, there was ample evidence upon which both accused could have been convicted under section 380 of the Penal Code and I therefore altered the conviction of the 1st accused to one under this section. I did not interfere with the conviction of the 2nd accused because he was not present at the hearing and the alteration of the conviction to one under section 380 might be thought to be an order to the prejudice of the accused within the meaning of section 322(2) of the Criminal Procedure Code.

The second point arose from the order of the learned President that the money found on the person of accused No. 1 should go in payment of the fine. Although of course it was impossible to identify the actual notes which the complainant had lost it seemed to me that the circumstances were so strong as to make it virtually certain that $40 of the $51 found on the person of accused No. 1 belonged to the complainant, who is, therefore, entitled to restitution of his property.

Except in respect of this $40 I saw no reason to interfere with the sentence and I therefore varied the sentence on accused No. 1 by reducing the fine to $10 instead of $50 and by ordering that the $40 being the balance of the original fine be paid to the complainant.

Judgment accordingly.

CHOP LEAN YAK v. NG AH HEE.

[A. C. J. (Spenser Wilkinson, J.) November 18, 1952]

[Penang — Civil Appeal No. 3 of 1952]

Landlord and tenant — Claim for possession — Arrears of rent — Whether duty of tenant to tender rent due or duty of landlord to demand rent on the premises or elsewhere.

The important point raised in this appeal regarding a claim for possession on the ground of rent being in arrears for more that 14 days is whether it is the duty of a tenant to tender rent to the landlord, or whether it is the duty of the landlord to demand the rent on the premises or elsewhere.

Held: it is the duty of the landlord to make a demand for rent on the premises and if he does not do so he cannot rely upon the proposition that rent is in arrear.

Cases referred to:—

(1) *Haldane v. Johnson* 8 Ex. 689.

(2) *Thung Fun v. Looi Fong Um* (1952) M.L.J. 122.

(3) *Kor Aik v. Tay Aik Liok* (1951) M.L.R. 103.

(4) *Tan Yee Moh v. Varthammal* (1948) M.L.J. 55.

(5) *Varthammal v. Tan Yee Moh* (1948) M.L.J. 180.

CIVIL APPEAL.

Eusoffe Abdoolcader for the appellants.

Lim Cheng Poh for the respondent.

Spenser Wilkinson, J. : — The claim in this action was to recover possession of premises No. 27, Cross Street, Bukit Mertajam on the ground that rent was in arrear for more than fourteen days.

There was a conflict of evidence in the Court below. Evidence was given by the plaintiff-respondent that he went to collect the rent for August on the 30th August, 1951 at the premises but that the defendant told him that he had no money. He also stated that he went again on the 30th September and on the 1st October, 1951 but that the defendant had no money. The defendant-appellant in his evidence denied that the plaintiff had called at the premises at all and stated

that the rents had been paid by his assistant up to July, 1951 and that nobody had come to collect thereafter. The assistant gave evidence to the effect that he had paid the rents for May, June and July to the same rent collector who had come in April, 1951. He also stated that he had paid the rent for August to a different person, and it may be that he made a mistake here, as there is no suggestion that the rent for August was ever paid.

The learned Magistrate in his Grounds of Decision does not appear to me to have decided one way or the other whether he believed the plaintiff or the defendant on the question whether the plaintiff in fact called at the premises and demanded rent. Paragraph 2 of his Grounds of Decision reads as follows:—

"Plaintiff became owner of the said premises on 1st May, 1951 and rent had been paid to him by defendant for the months of May, June and July, 1951 vide counterfoil receipts — Exhibit P.2. Therefore defendant must have had knowledge that plaintiff was owner of the premises in August and September, 1951."

It seems to me that the learned Magistrate in drawing this conclusion misinterpreted the evidence given by the respondent. The respondent had said: "I received rent from the defendant for the months of May, June and July, 1951", but this statement does not necessarily mean that the defendant paid personally and I am inclined to think that the respondent did not mean this. I think all he meant was that he received rent and that it came from the defendant. The inference, therefore, that the defendant must have had knowledge that the plaintiff was the owner cannot be sustained on this evidence alone.

The most important ground of the Magistrate's decision is that contained in paragraph 3, in which he states that the defendant made no attempt to tender rent lawfully due before the receipt of the notice to quit. Mr. Abdoolcader for the appellant submitted that this amounted to a misdirection of himself by the Magistrate on the law. He contended that it is no part of the duty of a tenant to tender rent to the landlord but on the other hand it is the duty of the landlord to demand the rent on the premises, unless there is an express contract for payment of the rent elsewhere. He relied upon the English case of *Haldane v. Johnson*[1] and upon the decision of the Court of Appeal in *Thung Fun v. Looi Fong Um*[2] where the decision of Abbott, J., in *Kor Aik v. Tay Aik Liok*[3] was doubted.

The Court of Appeal in *Thung Fun v. Looi Fong Um*[2] did not specifically decide anything but sent the case back to be tried *de novo* by the Sessions Court. It is significant, however, that in so sending the case back they directed that the Court below should make a definite finding of fact on whether there was any agreement as to where the rent should be paid and whether a demand for the rent on the premises had been made. This combined with the doubt expressed in the judgment of Murray-Aynsley, C.J., as to the correctness of the case of *Kor Aik v. Tay Aik Liok*[3] leads me to the conclusion that the Court took the view that a demand for rent on the premises is necessary, and were following the decision of Evans, J., in *Tan Yee Moh v. Varthammal*[4]. In that case, too, the Court of Appeal found it necessary to send the case back in order to resolve the issue of fact as to whether there had been a demand for rent on the premises, but in their judgments they expressly agreed with that part of the judgment of Evans, J., which laid down that the landlord must demand the rent on the premises. (*Varthammal v. Tan Yee Moh*[5]). Upon these authorities I felt bound to hold that it is the duty of the landlord to make a demand for rent on the premises and that if he does not do so he cannot rely upon the proposition that rent is in arrear.

As the learned Magistrate has not in this case decided the issue as to whether there was a demand on the premises or not I decided I had no alternative but to send the case back for re-trial in order that this point might be resolved.

Re-trial ordered.

CHOP TOH NEO v. THE SINGAPORE TRACTION CO., LTD. & ANOR.

[O. C. J. (Brown, J.) November 19, 1952]

[Singapore — Suit No. 624 of 1952]

Practice — Costs — Apportionment — Where plaintiff accepts money paid into Court after hearing started — Bullock Order.

The 1st defendants had made a payment into Court with a denial of liability on the day before hearing. The hearing lasted 4 days and at the end of the 4th day, after counsel for the defendants had completed their final speeches but before completion of the final speech by counsel for the plaintiff, the plaintiff accepted the amount paid into Court and discontinued the action against the 2nd defendant.

Held: the proper course is to award costs upon the basis of what the judgment would have been on the various issues reached if it had been delivered.

ISSUE AS TO COSTS.

D. H. Murphy for the plaintiff.

J. D. Donnelly for the 1st defendants.

L. A. J. Smith for the 2nd defendant.

Cur. Adv. Vult.

Brown, J. : — The plaintiff, having now accepted the sum of $7,000 which the 1st defendants paid into Court with a denial of liability and having discontinued the action against the 2nd defendant, the only question which remains is what order should be made as to costs.